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Supreme Court, U.S.
FILED

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No. 97-___

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

FELIX A OLIVIERI,

Petitioner,

v.

MATT L. RODRIGUEZ,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When a municipality discharges a probationary police officer on grounds which carry the scarlet letter of perpetual unemployability as a police officer,

Must the reasons for the discharge be publicly disseminated before the employee is entitled to the name clearing hearing recognized by *Board of Regents v. Roth,* 408 U.S. 564, 573 n.12 (1972)?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Felix A. Olivieri respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on August 15, 1997.

OPINIONS BELOW

The decision of the Court of Appeals (App. 1-6) is reported at 122 F.3d 406. The opinion of the district court (App. 8-13) is unreported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254: The judgment of the court of appeals (App. 7) was entered on August 15, 1997.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States.

STATEMENT

While employed by the City of Chicago as a probationary police officer, petitioner was discharged on allegations of sexual harassment.[1] At the time of his discharge, petitioner had successfully completed training, but as a probationary employee, he did not have a right under state law to receive

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1. Petitioner has consistently denied these allegations and contends that the accusations of sexual harassment were contrived to harass, inconvenience, and embarrass him.

a hearing on the allegations of wrongdoing.

As a result of his discharge, petitioner has been unable to find other employment as a police officer. (App. 8-9.) Department Prospective police employers have uniformly refused to employ petitioner on learning of the reason for his discharge from the Chicago Police. (Id.)

Petitioner commenced this action under 42 U.S.C. §1983 to obtain the "name clearing hearing" mandated by *Board of Regents v. Roth,* 408 U.S. 564, 573 & n.12 (1972). The district court dismissed the action, applying the "communication" requirement that the Seventh Circuit had engrafted on *Board of Regents v. Roth* liberty interest claims. (App. 11.) On appeal, the Seventh Circuit acknowledged an intercircuit conflict on the "communication requirement" (App. 3) and re-affirmed its position on this issue. (Id.)

REASONS FOR GRANTING THE WRIT

The circuits are divided on whether a public employee who is discharged on grounds which render him (or her) permanently unemployable in a particular occupation may maintain an action for damages under 42 U.S.C. §1983 without establishing that the defendant disseminated the basis for the employee's discharge.

In *Schware v. Board of Bar Examiners,* 353 US. 232 (1957), the Court held that "[a] State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process Clause or Equal Protection Clause of the Fourteenth Amendment." Id. at 238-39. The Court reaffirmed this view of the Due Process Clause in *Cafeteria Workers v. McElroy,* 367 U.S. 886 (1961), referring to a constitutional "right to follow a chosen trade or profession," id. at 895-96, and again in *Board of Regents v. Roth,* 408 U.S. 564 (1972), where the Court held that the Due Process Clause would be implicated if "the State, in declining to re-employ respondent, imposed

on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." Id. at 573. "In such a case, due process would accord an opportunity to refute the charges before University officials." Id.

In *Ratliff v. City of Milwaukee,* 795 F.2d 612 (7th Cir. 1986), the Seventh Circuit engrafted onto the *Roth* name clearing hearing a "communication requirement," holding that that "[a]bsent proof that the Police Department or any of the defendants disseminated the stigmatizing information in a manner which would reach future potential employers of the plaintiff or the community at large, she cannot show that the defendants' actions impinged on her liberty interest in pursuing her occupation." 795 F.2d at 627.

As the court below observed (Pet.App. 3), the Court of Appeals for the Second, Fourth, and Eleventh Circuits have rejected this "communication requirement." In *Donato v. Plainview-Old Bethpage Cent. School Dist,* 96 F.3d 623, 631-32 (2d Cir. 1996) the Second Circuit held that the plaintiff need only show that "stigmatizing charges are placed in the discharged employee's personnel file and are likely to be disclosed to prospective employers." Cases from the Fourth and Eleventh Circuits are in accord. *Ledford v. Delancey,* 612 F.2d 883, 886-87 (4th Cir. 1980); *Buxton v. City of Plant City,* 871 F.2d 1037, 1045 (11th Cir. 1989).

The Seventh Circuit's contrary rule — that dissemination by the defendant is required — is followed by the First and Third Circuits. *Ortega-Rosario v. Alvarado-Ortiz,* 917 F.2d 71, 74-75 (1st Cir. 1990); *Copeland v. Philadelphia Police Dep't,* 840 F.2d 1139, 1148 (3d Cir. 1988);

The Fifth and Eighth Circuits, in the words of the court below (Pet. App. 3), "have hedged" on this issue. See, e.g., *Hogue v. Clinton,* 791 F.2d 1318, 1322-23 n. 7 (8th Cir. 1986); *Burris v. Willis Independent School District, Inc.,* 713 F.2d 1087, 1092 (5th Cir. 1983).

As petitioner pointed out to the Court of Appeals, "no police department will hire [petitioner] without asking him why he was fired by the Chicago Police Department. If [petitioner] answers truthfully, he will reveal the ground of the termination as effectively as (actually more effectively than) if the Department had taken out a full-page ad in every newspaper in the nation announcing the termination of Felix A. Olivieri for sexually harassing female probationary officers at the Chicago police training academy." (App. 2-3.)

Petitioner was discharged on grounds which brand him with the scarlet letter of perpetual unemployability as a police officer. Governmental action has deprived plaintiff of his constitutional "right to follow a chosen trade or profession," *Cafeteria Workers v. McElroy,* 367 U.S. 886, 895-96 (1961), and further "communication" should not be required before petitioner is afforded the "opportunity to clear his name," recognized in *Board of Regents v. Roth,* 408 U.S. at 573 n.12.

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari should be granted.

November, 1997

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